

**REPORT WITH RESPECT TO THE APPLICATION OF [REDACTED]
TO SASKATCHEWAN PROPERTY MANAGEMENT CORPORATION
RESPECTING BUILDING ASSESSMENT REPORTS**

On August 21, 2000, [REDACTED] ("the Applicant") formally filed with Saskatchewan Property Management Corporation ("the Respondent") an Access to Information Request form. This request for information was filed by the Applicant pursuant to the provisions of *The Freedom of Information and Protection of Privacy Act* ("the Act") and described the information requested in the following words:

"Please provide a copy of most recent Building Assessment reports for all government buildings."

Access to the requested information was denied by the Respondent. In a letter addressed to the Applicant dated September 15, 2000, the Access Officer for the Respondent, Leslie Krug, outlined the basis for refusing access to the information in the following terms:

"The information you have requested has been denied for the following reasons:

- The records were created to present advice, proposals, recommendations, analyses or policy options to the Executive Council;
- The records could reasonably be expected to disclose advice, proposals, recommendations and analyses or policy options developed by or for a government institution;
- The records could reasonably be expected to disclose information, including the proposed plans, policies or projects of a government institution, which could reasonably be expected to result in disclosure of a pending policy or budgetary decision;
- The records could reasonably be expected to disclose information which could reasonably be expected to interfere with contractual or other negotiations of the Government of Saskatchewan or a government institution.

Information of this nature is exempt from access according to Subsections 16(1)(a), 17(1)(a), 17(1)(g), 18(1)(d), of *the Freedom of Information and Protection of Privacy Act*."

The Applicant formally requested that I undertake a Review on September 20, 2000. In his Request for Review, the Applicant set out his position respecting the four grounds for denial of access that had been articulated by the Respondent. The Applicant's arguments in these four areas are reproduced verbatim hereunder:

- “The records were created as advice, etc., to Executive Council ...

This exemption is very precise and relates to documents prepared for cabinet. It does not relate to documents generally held by departments or agencies that may have many uses and may become background information for cabinet, or be provided to cabinet along with “advice, etc.” The building reports are routine documents, assembled and prepared at routine intervals. If the exemption were applied to these documents, it would follow that any document prepared by a department, which could – at some time – make its way to cabinet would be exempt. This is not consistent with the exemption, nor with the intentions of the legislators who drafted and passed the Act. Documents which are captured in the cabinet confidence exemption are those which are created with the expressed intent of being “for cabinet”.

- The records could reasonably disclose a plan, policy, project or pending policy or budgetary decision.

This exemption, again, relates to something very precise, that is a plan or a policy, etc. A building assessment report, however, is simply that: an assessment of a building. It is no more a plan or a policy than is the daily attendance record of an elementary school. It is a descriptive document, which may contain analysis, but it is not a document which outlines a course of action, nor is it a prescriptive document, outlining a policy.

- The records could disclose a plan ...

Again, a descriptive record of a building’s condition is not something which outlines or would tend to disclose a plan or a course of action. It may be something that supports a plan, or serve [sic] as background to support a policy. But the assessment itself is not a plan, or could it reveal a plan. It may contain analysis and may possibly contain estimates of costs for various possible conditions of the buildings. However, that information is not a “pending budgetary decision”, as set out in the exemption. A pending budgetary decision is an item that is before the decision-makers, awaiting their deliberations. A descriptive record, which may include budgetary “**implications**”, is distinct from a record that could reveal a pending “**decision**”. To illustrate the point, consider documents held by institutions that relate to filling vacate [sic] positions in the government service. These documents are widely available. Indeed, government departments publish and advertise to fill vacancies. However, knowing that a vacancy is to be filled, one would also know that there is a budgetary element, since the person filling that vacancy would be paid. In short, there is a budgetary implication attached to the information. But knowing about the vacancy does not reveal a budgetary decision. Similarly, knowing the condition of a particular government-owned building may reveal that expenditures are possible, even likely. However, it does not reveal a budgetary decision.

- The records could disclose information which could interfere with contractual or other negotiations ...

This exemption was carefully worded by the legislators to apply only to documents where the disclosure would “**reasonably**” disclose information which would “**reasonably**” interfere with business. The reasonable [sic] test is not a modest standard where anything that **possibly** could happen is captured. As has been well established in the case law on Access to Information, there must be shown a clear link between the potential harm or injury or “interference” and the disclosure. The words of the federal access to information commissioner are instructive here:

[T]he injury test exemption (in this case 16(1)(c) and 20(1)(c)) impose a heavy burden of proof on those asserting the protection. Mere speculation that injury is likely to result from disclosure, is insufficient. So, too, are assertions that such information is secret in other jurisdictions. The test is objective, not subjective, and requires concrete evidence showing the nature of the expected injury and the nexus between disclosure and the injury.

[Annual Report 1998-99]

The gathering of information pertaining to a building’s condition is not a secretive art, nor is it exclusive to government. The information requires expertise generally available and the disclosure of the assessments would reveal nothing that could affect the business dealings of the institution. Indeed, when any entity – government or non-government – seeks to engage people in works, it is routine to supply detailed documents (for a nominal fee) to solicit tenders. A more generalized assessment would reveal nothing that could interfere with that process, or any other commercial process.”

I determined that I would undertake the Review as requested by the Applicant and so advised the Respondent. At the same time, I provided the Respondent with a copy of the arguments submitted by the Applicant and invited the Respondent to provide me with any rebuttal submissions by way of response. No rebuttal submissions have been received by me.

For purposes of carrying out my Review, I determined that it would be necessary for me to personally inspect the reports in question. On January 9, 2001, I reviewed six selected Facility Assessment Reports, which I was informed were reflective of the types of reports that had been prepared for the Respondent in relation to some of the approximately 900 individual buildings and structures under the care and management of the Respondent. I am informed that the Respondent has Building Assessment Reports in respect of approximately 100 of the properties it manages. The buildings in relation to which reports I reviewed are as follows:

1. The Health Building, 3211 Albert Street, Regina, Saskatchewan;
2. The Court House, Assiniboia, Saskatchewan;
3. Saskatchewan Property Management Corporation head office building, 1840 Lorne Street, Regina, Saskatchewan;
4. T.C. Douglas Building, Regina, Saskatchewan;

5. S.I.A.S.T., Marquis Road Centre, Prince Albert, Saskatchewan;
6. Moose Jaw Court House, Moose Jaw, Saskatchewan.

Most of the reports which I examined have been prepared within the last three to four years, the earliest being dated November, 1996 and the most recent being dated March 15, 2000.

Each of the reports has been prepared by an architectural consulting firm, sometimes with assistance and input from engineering specialists in the fields of structural, mechanical and electrical engineering. The reports are given different names and titles such as "Accommodation Study", "Building Condition Assessment" and "Facility Assessment". I will refer to them in this Report as Building Assessment Reports. In each case, the report was commissioned by the Respondent and although each report, of course, varies as to its contents, they were similar respecting the general format of the report. A typical report is comprised of an index, a description of the object of the report, an executive summary, a history of the building in question, a detailed description of the structural, mechanical and electrical aspects of the building together with recommendations and estimated costs respecting the recommendations.

Although I have not personally examined the totality of the Facility Assessment Reports on file with the Respondent, I am assured by those individuals with whom I have spoken at the office of the Respondent that the unexamined reports are similar in nature and purpose to the reports I have examined, and that the six reports which were provided to me are fair samples of the materials to which the Applicant seeks access.

██████████ is a senior engineer in charge of project administration for the Respondent. He has informed me that the Respondent has arranged and does arrange from time to time for the professional assessment of a number of buildings owned by the Government of Saskatchewan to determine the condition of the specific building, particularly in relation to building access and safety requirements and for the further purpose of obtaining some estimates of cost of repair. This information assists the Respondent, which is responsible for the care and administration of these buildings, in determining what action should be taken with respect to the ownership of the building with regard to options in the areas of selling or upgrading and the making of decisions as to what resources should be directed towards the upkeep and/or improvement of specific buildings.

In pursuance of Section 61 of the *Act*, the onus of proof rests on the Respondent to establish that access to the Building Assessment Reports "may or must be refused or granted" by reason of the provisions of the *Act*. The sections upon which the Respondent relies for denying access are sections 16(1)(a), 17(1)(a), 17(1)(g) and 18(1)(d) of the *Act*.

Section 16(1)(a) provides as follows:

“16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

(a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees;”

There is nothing in the individual files that I have reviewed that indicate that the Building Assessment Reports were prepared for the purpose of presenting any advice, proposals, recommendations, analyses or policy options to the Executive Council or that the reports or any portions of them were presented for the above-mentioned purposes to Executive Council.

I am informed by representatives of the Respondent that the only matter that might find its way to Executive Council would be selected excerpts from reports related to costs of renovation or repair and these excerpts would be submitted in support of budget requests. No evidence was given to me that this has happened in respect of the Building Assessment Reports in issue.

In my view, the Respondent has not met the onus on it respecting the applicability of Section 16(1)(a).

Section 17(1)(a) provides as follows:

“17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

(a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;”

There are portions of the reports that I have perused that include proposals, costs analyses and option considerations which are intended for the Respondent. Some of the reports that I reviewed do not contain any analyses as to the cost of repair or recommendations in the financial areas.

In my view, there are large portions of the reports that I have perused that may be produced without offending the provisions of Section 17(1)(a) by simply deleting from the report any reference to cost analyses, financial alternatives with respect to the particular building or recommendations

regarding tender process. Matters related to financial advice, proposals or recommendations can be reasonably severed from the body of the reports, as contemplated by Section 8 of the *Act*, in my view.

Section 17(1)(g) of the *Act* is a further ground of exemption relied upon by the Respondent and provides as follows:

“17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(g) information, including the proposed plans, policies or projects of a government institution, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.”

As previously observed, some of the reports do include options for the Respondent in respect to repair or altering certain portions of the building or structure which is the subject matter of the report. These proposals and options often constitute a small portion of the report and are severable from the main body of the individual report with no resulting disclosure “of a pending policy or budgetary decision”.

Section 18(1)(d) of the *Act* provides as follows:

“18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

...

(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the Government of Saskatchewan or a government institution;”

Those particular reports which do in fact contain information that, if made public might reasonably interfere with contractual or other negotiations of the Respondent, can, in my view, be severed from the body of the main report so that there is no reasonable prospect of revealing information in contravention of the provisions of Section 18(1)(d).

The Building Assessment Reports that I have examined vary in length; some are a dozen to 15 pages in total; other reports run to 40 or 50 pages. The majority of the reports, however, contain factual matters, the release of which would not breach any of the provisions of the *Act* relied upon by the Respondent. Having regard to the reports that I have reviewed and the assertions of representatives of the Respondent that these reports are similar to the reports that I have not personally viewed, it is apparent that these reports are largely comprised of such matters as a detailed index, an executive summary, a history of

the building in question and extensive technical reviews. Recommendations and the proposals or options are often located in one section of the report and can be easily identified and severed.

I therefore recommend that the Respondent prepare and submit to the Applicant an estimate of the costs that it expects it would incur in carrying out the severing from the Building Assessment Reports it has on file all references to financial estimates, renovation proposals or building management options, which estimate of costs will be identified in accordance with the provisions of the *Act* and the Regulations passed thereunder. I further recommend that upon the Applicant making appropriate arrangements for the payment of the costs of the severing of the financial recommendations and proposals from the reports, that copies of the balance of reports be produced and furnished to the Applicant.

[REDACTED]

Dated at Regina, in the Province of Saskatchewan, this 26th day of January, 2001.

GERALD L. GERRAND, Q.C.
Commissioner of Information
and Privacy for Saskatchewan